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Before the
Federal Communications Commission
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the Local Competition)
Provisions in the Telecommunications Act)
of 1996)
)
Interconnection Between Local Exchange)
Carriers and Commercial Mobile Radio)
Service Providers)

CC Docket No. 96-98

CC Docket No. 95-185

**JOINT REPLY COMMENTS OF KMC TELECOM, INC.,
CHOICE ONE COMMUNICATIONS AND CTSI, INC.**

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SUMMARY

In their initial comments in this proceeding, the incumbent local exchange carriers (“ILECs”) argue that the Commission should interpret sections 251(c)(3) and 251(d)(2) of the Act as though they merely codify the essential facilities doctrine, and other principles of antitrust jurisprudence. As a corollary to this argument, the ILECs maintain that a geographic market-by-market assessment of UNE availability is required under section 251(d)(2) and, therefore, the Commission is precluded from promulgating a national list of UNEs. The ILECs further argue that the fact that a single competitive LEC is using a network element obtained outside the ILECs’ network means the necessary and impair standards cannot be met for that element. The ILECs then apply these onerous principles with the predictable result that virtually no network elements are required to be unbundled under section 251.

The ILECs’ arguments that Congress or the Supreme Court incorporated precepts from the essential facilities doctrine or other antitrust principles into the necessary and impair standard are unfounded. Their arguments are inconsistent with the procompetitive goals of the Telecommunications Act of 1996 (“1996 Act”), the plain meaning of section 251(d)(2), and the structure of the 1996 Act. In crafting the 1996 Act Congress was not merely codifying preexisting antitrust principles; rather, Congress sought to jumpstart local exchange competition by imposing procompetitive obligations solely on ILECs that facilitate market entry by at least three entry strategies: resale of ILEC retail services at wholesale rates, interconnection, and facilities-based market entry utilizing unbundled ILEC network elements. The ILEC’s focus on antitrust principles is an attempt to eviscerate the facilities-based market entry strategy that Congress envisioned when it

enacted section 251(c)(3). Their approach would essentially render section 251(c)(3) a nullity.

The Commission should reject the ILECs' approach and establish UNE rules that comport with the procompetitive purposes of the 1996 Act. The Commission should adopt an interpretation of section 251(d)(2) that balances procompetitive factors against the necessary and impair standards to determine which network elements should be subject to the unbundling obligation. A balanced interpretation of section 251(d)(2) would necessarily examine the extent to which alternatives to ILEC UNEs are interchangeable, considering the cost, quality, operational substitutability, timeliness, and ubiquity of alternative sources of network elements. The Commission should adopt a national list of UNEs in order to avoid redundant and protracted state-by-state litigation that would add uncertainty to competitive LEC business plans, cause needless delay in competitive entry, waste crucial resources, and frustrate competition.

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**JOINT REPLY COMMENTS OF KMC TELECOM, INC.,
CHOICE ONE COMMUNICATIONS AND CTSI, INC.**

I. INTRODUCTION

KMC Telecom, Inc., Choice One Communications, and CTSI, Inc. (“Joint Commenters”), by their undersigned counsel, submit these reply comments in response to the Federal Communication Commission’s (“Commission”) April 16, Second Further Notice of Proposed Rulemaking in the above-captioned proceeding (“UNE NPRM”).¹ This proceeding concerns access to unbundled network elements (“UNEs”) and was initiated in response to the Supreme Court’s decision in *AT&T v. Iowa Utilities Board*

¹ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98 & 95-185, Second Further Notice of Proposed Rulemaking, DA 99-70 (rel. April 16, 1999) (“UNE NPRM”).

(“*Iowa Utilities Board*”).²

The Joint Commenters argued in their initial comments that the Commission has broad discretion and a reasonable basis to mandate unbundling of a wide range of network elements in light of the statutory standards and procompetitive purposes of the Communications Act of 1934, as amended by the Telecommunications Act of 1996³ (“Act”). By contrast the incumbent local exchange carriers’ (“ILEC”) proposals regarding competitive access to UNEs are based upon the “essential facilities doctrine” and other principles of antitrust law that are not consistent with the text, structure or purposes of the Act. The ILECs’ interpretation of the Act would impede competitive entry, compel inefficient build-out of network facilities and effectively render UNE-based market entry a nullity contrary to the intent of section 251(c)(3) of the Act. Thus, the Commission should reject the ILECs’ narrow interpretation of the necessary and impair standards of section 251(d)(2), and instead adopt rules that interpret these unbundling standards in light of the Act’s procompetitive purposes.

II. SECTION 251(d)(2) DOES NOT CODIFY THE ESSENTIAL FACILITIES DOCTRINE OF ANTITRUST LAW AS ASSERTED BY ILECS

In their comments, the central theme of the ILECs and their principal trade association, the United States Telephone Association (“USTA”), is that any interpretation of the “necessary and impair” standards should be primarily guided by the “essential

² AT&T Corp. v. Iowa Utilities Board, 119 S.Ct. 721 (1999) (“*Iowa Utilities Board*”).

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §151 *et seq.*) (“1996 Act”).

facilities doctrine”⁴ and market power analysis of antitrust law.⁵ USTA, for example, maintains that “[t]he Supreme Court, in *Iowa Utilities Board* . . . strongly suggested that the economic analysis of antitrust law provided the Commission with a useful model for interpreting section 251(d)(2).”⁶ Ameritech goes even further, stating that “the [Supreme] Court adopted the key precepts of [the essential facilities] doctrine.”⁷

Contrary to the ILECs’ assertions, the Supreme Court did not state any preference for, let alone adopt, the essential facilities doctrine or any other antitrust principles as the touchstone for interpreting the necessary and impair standards.⁸ Justice Scalia’s majority opinion merely recognized that the ILECs have consistently argued that the necessary and impair standards codify something akin to the essential facilities doctrine.⁹ Then, far from endorsing or adopting the essential facilities doctrine, Justice Scalia deliberately left the issue open and pointedly stated that “it may be that some other standard would provide an equivalent or better criterion for the limitation upon network-element availability that the statute has in mind.”¹⁰

ILEC arguments that Congress incorporated precepts from the essential facilities doctrine or market power analysis into the necessary and impair standard are equally

⁴ *U.S. v. Terminal R.R. Ass’n of St. Louis*, 224 U.S. 383 (1912) (seminal case regarding the essential facilities doctrine); *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-1133 (7th Cir.), cert. denied, 464 U.S. 891 (1983) (reviewing modern cases); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 451 (1992) (refusal to deal case).

⁵ Comments of the United States Telephone Association (“USTA”) at 3, 6, 23; Affidavit of Jerry A. Hausman and J. Gregory Sidak (“Hausman & Sidak Affidavit”) at 17; Comments of U.S. West, Inc. (“U.S. West”) at 6-7; Comments of BellSouth at 12-17; Comments of Ameritech at 15, 28-31.

⁶ Hausman & Sidak Affidavit at 11.

⁷ Comments of Ameritech at 15.

⁸ Comments of MCI Worldcom, Inc. (“MCI”) at 28, 30.

⁹ *Iowa Utilities Board*, 119 S.Ct. at 734.

¹⁰ *Id.*

unfounded. These arguments are inconsistent with the plain meaning of the text of section 251(d)(2) and the structure of the Act. In fact, Congress considered and rejected the essential facilities doctrine during the legislative process leading to passage of the Act.¹¹ Congress deliberately chose not to require a showing that a network element was an “essential facility” as a prerequisite to mandating unbundling of a network element. Instead, Congress purposefully adopted the broader language of the “impair” standard, which examines whether “failure to provide access to [non-proprietary] network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”¹² Congress was fully cognizant of the essential facilities doctrine and would have explicitly referred to this doctrine and its components in the text of the Act, had it intended to incorporate the doctrine into section 251(d)(2) as asserted by the ILECs.

The essential facilities doctrine is primarily used to determine whether a company has violated section 2 of the Sherman Act¹³ by engaging in willful acquisition or maintenance of market power.¹⁴ Congress crafted the 1996 Act, on the other hand, to achieve the broader purpose of rapidly opening telecommunications markets to competition after decades of state sanctioned monopoly.¹⁵ In the 1996 Act, Congress

¹¹ 140 Cong. Rec. H5216, H5243 (daily ed. June 28, 1994) (debating H.R. 3636, 103d Cong. (1994)); H. R. Rep. No. 204, 104th Cong. 2d Sess. at 49 (1995) (explicit reference to essential facilities doctrine); *See* Comments of MCI at 35-36.

¹² 1996 Act, 47 U.S.C. § 251(d)(2).

¹³ 15 U.S.C. § 2.

¹⁴ E. Thomas Sullivan & Jeffrey L. Harrison, *Understanding Antitrust and Its Economic Implications* 230-232 (1994).

¹⁵ Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1 (1996) (Congress sought to establish a “procompetitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.”).

went well beyond the narrow confines of antitrust law and imposed affirmative, procompetitive obligations on the ILECs designed to open the local exchange market to competition including, *inter alia*: the ILEC obligation to offer its retail services for resale at wholesale rates; the obligations to permit competitors to interconnect and collocate equipment at ILEC facilities; and the obligation to provide unbundled access to network elements.¹⁶ A reading of the necessary and impair standards that interprets the unbundling obligation as merely precluding anticompetitive conduct by the ILECs through operation of the essential facilities doctrine, such as that proposed by the ILECs, is wholly inconsistent with the affirmative market-opening objectives and text of the 1996 Act.

Congress expressly preserved competitors' antitrust rights and remedies in section 601(b)(1) of the 1996 Act providing that nothing in the Act "shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."¹⁷ This provision indicates that Congress was not merely codifying competitors' antitrust rights and remedies in the 1996 Act; rather, it was affording them new rights to jumpstart competition.¹⁸ The ILEC's narrow interpretation of sections 251(c)(3) and 251(d)(2) renders these sections superfluous because section 601(b) already preserves competitors' antitrust rights. Therefore, their construction of the Act is erroneous.

III. ADOPTING A NATIONAL MINIMUM LIST OF UNES IS CONSISTENT WITH THE ACT AND WILL PROMOTE COMPETITION

¹⁶ Comments of MCI at ii, 28-32; 1996 Act, 47 U.S.C. §251(c)(2)-(6).

¹⁷ Comments of MCI at 31 (quoting Pub. L. 104-104, § 601, 110 Stat. 143 (Feb. 8, 1996)).

¹⁸ See H.R. Rep. No. 104-204, 104th Cong. 2d Sess. at 89 (1995) ("the purpose of this legislation is to shift monopoly markets to competition as quickly as possible").

As a corollary to their premise that section 251(d)(2) incorporates antitrust principles, the ILECs and USTA argue that the Commission must make a market power determination and consider the need for mandatory unbundling in each relevant geographic market for each network element.¹⁹ The ILECs argue, therefore, that the Commission should not establish a national minimum list of UNEs; rather, in their view market-by-market determinations are required.

In *Iowa Utilities Board*, the Supreme Court upheld the paramount authority of the Commission to establish rules to implement the local competition provisions of the 1996 Act including section 251(d)(2). The Commission should use this authority to establish a national minimum list of UNEs. The ILEC's market-by-market approach to unbundling is administratively unwieldy, would hinder competitive entry, and generate wasteful regulatory and litigation costs. The Joint Commenter's experience is that economic and technical factors are sufficiently uniform across the nation to permit adoption of a national minimum list of UNEs. Moreover, to the extent that a national list of UNEs would suffer from some degree of imprecision, there is no reason to believe that state-by-state implementation would be an improvement. State boundaries do not define economic, technical, or even geographic boundaries that could form a rational basis for designation of UNEs. Significantly, many state commenters supported adoption of a national list of UNEs.²⁰

¹⁹ Comments of USTA at 4, 22; Hausman & Sidak Affidavit at 15; Comments of BellSouth at 13-14, 31, 66; Comments of SBC Communications, Inc. ("SBC") at 17.

²⁰ California Public Service Commission Comments at 3; Comments of the Connecticut Department of Public Utility Control at 3; Comments of the Illinois Commerce Commission at 2; Comments of the Iowa Utilities Board at 2; Texas Public Utilities Commission at 2; Comments of the Washington Utilities and Transportation Commission at 5.

Further, national UNE rules are needed to provide the requisite level of uniformity and predictability for competitive LECs to execute national business plans.²¹ Absent a national minimum list of UNEs new entrants will be forced to squander scarce funds on redundant litigation in multiple jurisdictions, rather than invest these funds in productive assets. The outcome of this needless multistate litigation would be highly uncertain, as evidenced by the protracted litigation that has followed the Commission's 1996 decision to leave the determination as to whether dark fiber and subloop elements should be UNEs to the states. The Joint Commenters' experience over the past three years is that the dark fiber and subloop element litigation has resulted in outcomes that are inconsistent from state to state for reasons that are unrelated to either local market conditions, network architecture or geographic variances between the states.²² The ILECs' market-by-market approach, therefore, would add significant uncertainty to the business plans of new entrants, raise their cost of capital, and impede nationwide product launches. A market-by-market approach would encourage the ILECs to engage in protracted and redundant UNE litigation in order to delay the onset of significant competition as long as possible. Accordingly, the Commission should reject ILEC calls for a regional or state implementation of market-by-market unbundling obligations.

IV. UNES SHOULD NOT SUNSET UPON THE EMERGENCE OF A SINGLE FACILITIES-BASED COMPETITOR IN A MARKET AS SUGGESTED BY THE ILECS

Several ILECs and USTA argue that if a single CLEC self-provisions a network element or a network element is available from a single source in a given market, then the ILEC cannot exercise market power in end-user services in that market, and there is no

²¹ Comments of MCI at 5.

continuing need to mandate unbundling of that network element.²³ Effectively, the ILECs argue that any degree of availability of a network element outside the incumbent's network means that unavailability of a UNE would not "impair" a competitor's ability to provide services, and access to that UNE is not "necessary."

The extreme view offered by the ILECs is not supported by either the text of the Act or the Supreme Court's decision. In *Iowa Utilities Board*, the Supreme Court directed the Commission to "consider the availability of elements outside the incumbent's network."²⁴ The Supreme Court also cautioned the Commission not to consider *any*, even a de minimus, increase in cost or decrease in service quality as sufficient to meet the necessary and impair standards as it had done in its *Local Competition Order*.²⁵ However, the Supreme Court did not determine that the Commission should disregard the relative cost, quality, ubiquity, operational substitutability and timeliness of alternatives to the ILEC's network elements in applying the necessary and impair standards as suggested by the ILECs' present interpretation. These factors dramatically affect a competitive LEC's ability to provide service and should be the measure of the extent to which network elements are available from self-provisioning or alternative sources outside the ILECs' networks.

As a practical matter, the ILECs' interpretation would render section 251(c)(3) a nullity by eliminating the UNE-based market entry strategy in all of the major markets and most secondary markets. This outcome was not intended by Congress when it

²² For a list of decided cases in which federal district courts have addressed dark fiber or subloop element unbundling see Comments of MCI at 7-8, note 15.

²³ Comments of USTA at 33; Comments of Bell Atlantic at 14-16; Comments of U.S. West at 12.

²⁴ *Iowa Utilities Board*, 119 S.Ct. at 735-736.

²⁵ *Id.*

enacted section 251(c)(3), and the Commission properly rejected a similar approach in the *Local Competition Order*.²⁶ Rather, section 251(d)(2) requires unbundling of ILEC network elements at least until an efficient wholesale network element market has developed, and competitively provided network elements are essentially interchangeable with ILEC elements.²⁷ Accordingly, as urged by the Joint Commenters and others in initial comments,²⁸ the Commission should “consider” the availability of elements from sources other than the incumbent by determining whether they are available at materially the same cost, quality, operational substitutability, ubiquity, and in the same time frame as ILEC network elements provided on an unbundled basis.

V. THE ILECS’ INTERPRETATION OF “PROPRIETARY” FACILITATES ILEC MANIPULATION OF AVAILABLE UNES

The ILECs argue that the term “proprietary” in section 251(d)(2)(A) should be read expansively to encompass any network element that embodies a legally protected form of intellectual property including patents, copyrights, and trade secrets; or contains proprietary information, even though unbundled access to the network element would not reveal any proprietary information.²⁹ Some ILECs would go further and preclude competitive LECs from utilizing network elements containing any intellectual property licensed from third parties.³⁰ Adopting the ILECs’ interpretation would enable ILECs to limit access to nearly every UNE through manipulative negotiation of third party license

²⁶ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, at ¶ 287 (rel. August 8, 1996) (“Local Competition Order”).

²⁷ Comments of Quest Communications Corp. at 18-21.

²⁸ Joint Comments of Choice One Communications, Network Plus, Inc., GST Telecom, Inc., CTSI, Inc., and Hyperion Telecommunications, Inc. at 6-7; Comments of MCI at 16-18.

²⁹ Comments of USTA at 28; Comments of Ameritech at 40-45.

³⁰ Comments of Ameritech at 40-45.

agreements, and would result in the application of the more rigorous “necessary” standard to nearly every network element.

Neither the Act or its legislative history evince a Congressional intent to require that “proprietary” be given such an expansive interpretation. Accordingly, the Joint Comments submit that the Commission should narrow the scope of the term “proprietary” to restrict the set of network elements subject to the “necessary” standard.

The Commission should adopt a presumption that any network element that is based upon industry standards cannot be proprietary.³¹ An element is proprietary only if providing unbundled access to the element would disclose proprietary information, beyond the information normally received in the course of the carrier-customer relation, that the ILEC does not provide to third parties. Because of the need for compatibility and interoperability, the Joint Commenters maintain that by necessity few, if any, network elements are proprietary. For example, none of the original seven UNEs established by the Commission are proprietary.

VI. THE COMMISSION SHOULD CONSIDER FACTORS IN ADDITION TO THE NECESSARY AND IMPAIR STANDARDS

Contrary to the intent of section 251(d)(2), the ILECs urge the Commission not to consider factors other than the necessary and impair standards,³² or argue that the Commission should only consider additional factors that curtail access to network elements.³³ Section 251(d)(2), however, explicitly provides the Commission with broad

³¹ The networks of most incumbent LECs and competitive LECs make extensive use of standards developed by BellCore (recently renamed Telcordia). *See Local Competition Order* at ¶ 388 (“loop elements are, in general, not proprietary in nature”); *Id.* ¶ 446 (“the record provides no basis for withholding these [interoffice] facilities from competitors based on proprietary considerations”).

³² Comments of Ameritech at 48.

³³ Comments of USTA at 24.

authority to consider factors beyond the necessary and impair standards, by directing the Commission to consider the necessary and impair standards only “at a minimum” in determining which network elements must be unbundled.³⁴ The Commission should utilize this statutory authority to balance factors which promote the procompetitive purposes of the Act against the necessary and impair standards in determining which elements should be subject to the mandatory unbundling obligation.

VII. THE COMMISSION SHOULD ADOPT A BALANCED VIEW OF INCUMBENT LEC UNBUNDLING OBLIGATIONS

The Joint Commenters urge the Commission to reject the constricted view offered by the ILECs in this proceeding of their unbundling obligations under the Act. The Commission should adopt a balanced view that takes into account the guidance provided by the Supreme Court while also preserving UNE-based market entry as a realistic alternative for providing competitive local telecommunications services.

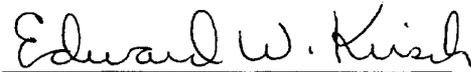
As demonstrated by the Joint Commenters and others in their initial comments, the Commission is not compelled by the Act or *Iowa Utilities Board* to adopt among all possible choices a constricted view of ILEC unbundling obligations in order to apply some limiting standard or to consider the availability of network elements outside the incumbent’s network. Instead, the Commission can, and should, adopt an approach that genuinely limits incumbent LEC unbundling obligations as required by *Iowa Utilities Board* while also retaining UNEs as a viable method of market entry.

³⁴ 1996 Act, 47 U.S.C. § 251(d)(2).

VIII. CONCLUSION

For the foregoing reasons, the Commission should adopt the recommendations in these reply comments.

Respectfully submitted,



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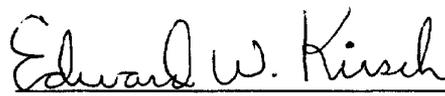
CERTIFICATE OF SERVICE

I, Edward W. Kirsch, hereby certify that on this 10th day of June 1999, copies of the foregoing Reply Comments of KMC Telecom, Inc., Choice One Communications and CTSI, Inc. were hand delivered to the parties listed below.

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